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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

ANTHONY CHRISTOPHER,

Plaintiff and Respondent,

v.

CARLENE THIE,

Defendant and Appellant.

B288151

(Los Angeles County
Super. Ct. No. BC662736)

APPEAL from an order of the Superior Court for Los Angeles County, Alan S. Rosenfeld, Judge. Affirmed in part, reversed in part.

Fredman Lieberman Pearl and Howard S. Fredman for Defendant and Appellant.

Raymond C. Schreck for Plaintiff and Respondent.

This case involves photographs and photographic negatives depicting images of Disneyland during its construction in 1954 and 1955 and during its grand opening in 1955, as well as images of various celebrities visiting the park in 1955. Plaintiff Anthony Christopher is in possession of the negatives and photographs (sometimes referred to as “the collection”). Defendant Carlene Thie, who is the granddaughter of the photographer, Mell Kilpatrick, claims that she is the rightful owner, and that the negatives and photographs were stolen from her. Christopher brought the instant action against Thie, alleging that Thie interfered with Christopher’s attempts to market the collection, which he claims he lawfully purchased from a relative of Kilpatrick.

Thie appeals from an order denying, in part, her special motion to strike under Code of Civil Procedure¹ section 425.16, the so-called anti-SLAPP statute.² She contends the trial court erred in denying her motion to strike the entire complaint, arguing that Christopher did not demonstrate a probability of prevailing on any of his claims. She also contends that regardless whether the court erred in denying the motion to strike the entire complaint, it erred by denying her motion to strike

¹ Further undesignated statutory references are to the Code of Civil Procedure.

² The trial court granted the special motion to strike as to two of the six causes of action alleged. Christopher did not appeal from this part of the court’s ruling; we do not consider his “request” in his respondent’s brief that he should “be allowed to proceed” on those two claims. (See *Celia S. v. Hugo H.* (2016) 3 Cal.App.5th 655, 665 [““To obtain affirmative relief by way of appeal, respondents must themselves file a notice of appeal and become cross-appellants””].)

two paragraphs of the complaint that allege acts that are absolutely privileged. We conclude that Thie properly moved to strike those two paragraphs, and that the trial court erred in denying the motion as to them. However, we find no error in the trial court's denial of Thie's motion to strike the first through fourth causes of action. Accordingly, we reverse the trial court's order to the extent it declined to strike paragraphs 34 and 37 of the complaint, and affirm the order in all other respects.

BACKGROUND

A. *The Complaint*

Christopher alleged in his complaint that he lawfully acquired possession of the collection (which includes over 1,000 images) in 1992. He alleged that he responded to an advertisement in the Los Angeles Times offering to sell vintage Disneyland photographs and negatives. He met with the seller, who told Christopher that he was the son of Mell Kilpatrick (who had died in 1962) and had received the collection from him. Christopher purchased the collection, and it has remained in his possession ever since.

The complaint alleged that in 2003, Christopher discovered that a photo book had been published which included many images from negatives in his collection. He contacted the author, Thie, to discuss the possibility of them collaborating on a book project that would use negatives from his collection and thus have higher quality photographs. He met with Thie at his home, and showed her his collection. Thie claimed that the negatives and photographs belonged to her and had

been stolen; Christopher denied her claim to ownership and said that he had obtained them lawfully. Thie left, and Christopher did not see or hear from her for ten years.

In early 2013, Christopher decided to sell the negatives, and entered into a consignment agreement with Michael Van Eaton of Van Eaton Galleries. Under the agreement, Van Eaton displayed and sold at collectibles shows photographs printed from the negatives; when a photograph was sold, Van Eaton retained a percentage of the purchase price and remitted the remainder to Christopher.

In August 2013, Thie went to Van Eaton's art show and saw the photographs printed from Christopher's negatives. She told Van Eaton's representative at the show that she was the rightful owner of the negatives of the photographs on display, that they were "stolen," and that Van Eaton was not entitled to sell them. Thie subsequently made several phone calls to Van Eaton, threatening to prosecute him and demanding that he turn over the negatives and photographs to her. Although Van Eaton told Thie that Christopher owned the negatives and photographs, he discontinued the consignment agreement with Christopher due to Thie's threats. Thie then contacted Christopher and claimed that the negatives belonged to her grandfather, Kilpatrick; she said that they were Thie's "inheritance/family legacy" and had been "stolen."

Over the next several months, Thie and Christopher discussed the possibility of collaborating on a book of photographs from the negatives, and even discussed the possibility of Thie buying the negatives from Christopher (although she continued to insist that the negatives and

photographs had been stolen.) In December 2013, however, Thie broke off those discussions. She did so in an e-mail to Christopher in which she stated that she had a “new mission in life,” which included plans to tell her story regarding the stolen negatives and photographs to her contacts in the news media and public relations.

A month later, in January 2014, Thie placed an advertisement in the classified ad section of the Los Angeles Times stating that Christopher “has her ‘grandfather’s stolen Disneyland images.” Thie subsequently initiated a lawsuit in small claims court against Christopher alleging copyright infringement and possession of stolen goods.³ After the advertisement ran in the newspaper, parties with whom Christopher had been negotiating a business contract refused to execute the agreement, citing the advertisement as the reason for their refusal.

Christopher filed the instant complaint against Thie in May 2017, alleging causes of action for interference with prospective economic advantage, negligent interference with prospective economic advantage, intentional interference with contractual relations, inducing breach of contract, intentional infliction of emotional distress, and negligent infliction of emotional distress.

³ The allegation regarding the advertisement was set forth in paragraph 34 of the complaint, and the allegation regarding Thie’s initiation of the small claims court lawsuit was set forth in paragraph 37.

B. *Special Motion to Strike*

1. *Thie's Motion*

Thie filed a special motion to strike under section 425.16. The notice of motion stated that Thie sought to strike the entire complaint and each cause of action; in addition, the notice stated that Thie also specifically sought to strike paragraphs 34 and 37, citing *Baral v. Schnitt* (2016) 1 Cal.5th 376 (*Baral*).

In support of her motion, Thie submitted her own declaration and several documents, some of which are described below, as well as the declaration of Preny Sarkissian, a legal assistant who conducted Internet searches on topics relating to Disneyland, Disneyland photographs and memorabilia, Mell Killpatrick, and Thie (the results of which searches were attached as exhibits) to show the extent of public interest in those topics. Thie also asked the trial court to take judicial notice of documents evidencing various copyright registrations in Thie's name related to books she self-published that contained photographs taken by her grandfather, as well as documents from a bankruptcy case she and her husband filed.

a. *Thie's Declaration*

Thie stated in her declaration that her grandfather, Mell Kilpatrick, worked for the Orange County Register under a contract that provided he would own the copyrights to all images he photographed. He had a close relationship with Walt Disney, who invited him to take photos of Disneyland during its construction and allowed him open access to the park after it opened. Kilpatrick, who

died in 1962, developed his photographs in his darkroom and stored his negatives and photographs there.

In 1988, Thie spoke to her grandmother, Katherine Kilpatrick, about the negatives and photographs in Kilpatrick's darkroom. Her grandmother allowed Thie to take a couple of boxes of photographs, negatives, and camera equipment at that time, and allowed her to take additional boxes over the next several years. By 1994, Thie had collected more than eight boxes of camera equipment, photographs, negatives, and film footage, which included over 800 vintage Disneyland images.

In late 1994, someone broke into the garage of the residence in which Thie was living and stole some of the Disneyland photographs (along with other photographs her grandfather had taken) and camera equipment.⁴ Although Thie made a police report of the theft at that time, she no longer had a copy of that report. In 1998, at Thie's request, her grandmother signed a document (a copy of which was attached to Thie's declaration) transferring to Thie "all copyrights, . . . the negatives and photos of Mell Kilpatrick" that her grandmother had inherited.

From 2002 to 2005, Thie authored, published, and copyrighted five books based upon the photographs that she still possessed after the theft.⁵ In February 2004, Thie was told that Christopher possessed

⁴ Despite the theft, Thie remained in possession of several of her grandfather's photographs.

⁵ Documents related to the copyrights of the books were attached to Thie's declaration.

negatives and photographs of Disneyland; Christopher did not allow her to visit him to see those items, however, until August 2006. When she went to Christopher's home, she saw that he had a large collection of Disneyland memorabilia. She told him that she was seeking photographs and negatives that had been stolen; Christopher "stretched out his arm and stated, 'Everything in this room is stolen.'"

Thie showed Christopher the books of her grandfather's photographs that she had published, and he said that he remembered seeing some of those same photographs in the boxes he had in his closet. Christopher showed her the boxes, which appeared to Thie to be some of the same boxes that had been stolen, but she was not allowed to look at the contents. Christopher offered to sell the negatives and photographs to her, or to collaborate on a book together, but Thie declined. After leaving Christopher's home, Thie called the police, who told her they could not help her until the photographs appeared in public and she could prove that Christopher possessed stolen negatives and photographs.

In 2013, Thie was told that Christopher was having Van Eaton make copies of some of the photographs to sell them at an upcoming Disney memorabilia event. Thie spoke to Van Eaton by telephone in August 2013, and told him that the photographs had been used by her in books she had published and copyrighted, and therefore he could not sell the photographs. Van Eaton told her that Christopher told him that the photographs were his, but he (Van Eaton) would refrain from selling them for a period to give Thie an opportunity to show him a police report stating that the photographs had been stolen.

In October 2013, Thie learned that Van Eaton was selling her grandfather's photographs at an event at the California Disney Hotel. Thie went to the event and spoke to one of Van Eaton's employees. The employee called Van Eaton, and Thie spoke to him, telling him that the photographs were copyrighted and he could not sell them. Van Eaton told her that he did not see why he should not sell them, given that he had not heard from her since August.

Christopher called Thie a few days later, asking her what she was trying to do. Thie told him she wanted her grandfather's photographs and negatives back, and offered to pay him what he had paid (which Christopher had said was \$6,000). Christopher wanted more than that because of inflation and, when Thie told him she did not have the money, he again proposed that they collaborate on a book. Christopher subsequently asked Thie for proof that the photographs and negatives belonged to her.

After exchanging messages and emails over the next several weeks, Christopher told Thie on December 5, 2013 that he wanted \$50,000 for the photographs and negatives, and if she did not want to buy them for that amount he would sell them to someone else. Thie responded by email, telling him that she had a change of heart and knew that he was not going to work with her. During a telephone conversation the next day, Christopher told Thie that he had purchased the photographs and negatives from her father. After Thie told him that her father had been dead for more than 30 years, he said that he bought them from her brother.

On January 8, 2014, Thie filed a small claims court lawsuit against Christopher for copyright infringement and possession of stolen goods. At around that same time, she placed the advertisement in the Los Angeles Times seeking information regarding Christopher and stating that he had her grandfather's stolen photographs.

In August 2014, after receiving a cease and desist letter from an attorney representing Thie, Christopher filed a lawsuit against Thie for tortious interference, inducing breach of contract, and infliction of emotional distress. Thie dismissed her small claims court lawsuit and filed a cross-complaint for copyright infringement; both Christopher's complaint and Thie's cross-complaint were dismissed without prejudice, and Christopher subsequently filed the instant action.

b. *Thie's Argument*

In her memorandum of points and authorities in support of her motion, Thie argued that Christopher's complaint is based on statements Thie made that Christopher was in possession of stolen photographs and negatives, as well as Thie's filing of her small claims lawsuit and her publication of an advertisement seeking information on Christopher for use in that lawsuit. She contended that those actions and statements fell within the scope of section 425.16 because "[t]he authenticity and ownership of Disney collectibles, particularly photos relating to the construction of Disneyland, is a matter of public interest."

Based upon her declaration and the documents she submitted, Thie argued that Christopher could not prevail on his claims because all

of the conduct at issue in the complaint was subject to either an absolute or qualified privilege under Civil Code section 47. She contended that her conduct in filing the small claims court lawsuit and placing an advertisement in the paper seeking evidence for that lawsuit were absolutely privileged under Civil Code section 47, subdivision (b) (the litigation privilege). With regard to the statements she made that the photographs and negatives in Christopher's possession belonged to her, Thie asserted that the statements were made by a person who was interested to a person who was interested, and thus were protected under the qualified privilege set forth in Civil Code section 47, subdivision (c) (the common-interest privilege), which protects such statements if made without malice. She argued there is no evidence that she had acted with malice, because she believes that she owns the photographs and negatives, as well as the copyrights on the images. Therefore, she contended that Christopher could not establish a probability of prevailing on any of his claims.⁶

2. *Christopher's Opposition*

In his opposition to Thie's motion, Christopher challenged the applicability of section 425.16 to his claims and presented evidence that he contended demonstrated a probability of prevailing.

⁶ Thie also argued that Christopher's interference with contractual relations failed because the privilege to protect one's own financial interest applied to her conduct. However, Thie does not assert this argument on appeal, so we do not address it further.

a. *Evidence in Opposition to Motion*

Christopher submitted two declarations in opposition to the motion to strike: the declaration of his attorney, George Brunt, and his own declaration.

Brunt declared that, in connection with his investigation of Thie, he obtained copies of police reports related to accusations made by Thie that certain people (other than Christopher) possessed Disneyland photographs that had been stolen from her. One of those police reports was attached as an exhibit to his declaration. That report indicates that an investigation was conducted by the Kootenai County (Idaho) Sheriff's Department in 2007; the investigator concluded that he could not determine where the alleged photographs were, and could not determine Thie's ownership of the photographs without a copy of the original burglary report.

Christopher's declaration stated the following. Christopher is a long-time collector of memorabilia and collectibles related to the entertainment industry. In or around November 1992, he responded to an advertisement regarding a collection of photographs and negatives depicting Disneyland during its construction and early years that were being offered for sale. A man who said he was a relative of Kilpatrick brought the collection to Christopher's office, and Christopher purchased it; the seller indicated that the purchase included the copyrights to the images in the collection. Christopher attached to his declaration a copy of a bank record documenting what he believed was the check that was written to purchase the collection; the check, dated November 9, 1992, is made out to Mark Love in the amount of \$3,000.

Christopher declared that Thie came to his home sometime between 2003 and 2006, and they discussed the possibility of collaborating on a new book featuring images from the collection. Christopher showed Thie some of his Disney memorabilia and some selected negatives from the collection, but he did not allow her to inspect the entire collection. He did not tell Thie that any of the items in his home were stolen; however, he might have said that everything there was for sale. Thie told him that the collection was stolen and demanded that he turn it over to her without compensation. He refused.

Christopher also described in his declaration his 2013 agreement with Van Eaton, and attached a copy of the written agreement. In the agreement, the parties placed a value of \$75,000 on the photographs and negatives. Christopher declared, however, that he has received other estimates valuing the collection as high as \$300,000.

In or around July 2013, Van Eaton told Christopher that he had been contacted by Thie, who told him and his employees that the collection had been stolen from her; she also had engaged in an altercation with his employees at the D23 Disney Convention. He returned the collection to Christopher and refused to continue to sell the photographs or negatives.⁷ Since that time, Christopher has been

⁷ Christopher attached to his declaration a copy of an email exchange between Van Eaton and Thie, in which Thie claimed that the photographs and negatives were stolen, and Van Eaton confirmed that he had returned all the photographs and negatives to Christopher and no longer was selling them.

unable to sell any part of the collection or retain Van Eaton's services to sell other collectible items he owns.

In or around October 2013, Thie offered to purchase the photographs and negatives from Christopher, but they could not agree on a price. In a series of emails from October to December 2013, copies of which were attached to the declaration, Christopher and Thie continued to discuss the possible sale of the photographs and negatives, as well as collaborating on a book. Thie continued to insist, however, that the photographs and negatives were hers and had been stolen.

On December 9, 2013, Thie sent an e-mail to Christopher stating that she had a "new mission in life." She said that she realized that she was "sitting on . . . a fantastic story of a victim, pred[ator], stolen merchandise, extortion, bad feelings, and threats." She continued: "The real exciting news is, I have an endless supply of news media writers, magazine editors and public relation contacts that would be looking forward to publishing not just one story but all . . . the articles that document this on going saga. [¶] Further more [sic] my very large network of theme park corporations executives, movie studio executives, auction houses, and decision makers and influencers in the entertainment industry would also enjoy hearing from the granddaughter of Mell Kilpatrick who was a close personal friend and confidant of Walt Disney him self [sic]. [¶] Further more, [sic] once I get started documenting my story and showing the evidence I will be getting them up on Internet. Which I know a few news feeds that will rol[l] with it right away so I can start building momentum."

Finally, Christopher declared that, beginning in September 2013, he had been working on a potential business deal that was scheduled to close in or around February 2014. However, the other parties to the deal backed out after they became aware of an advertisement Thie had placed in January 2014 in the classified ad section of the Los Angeles Times. The advertisement stated: “WANTED [¶] Info on Tony Christopher of Landmark Entertainment Group in Burbank, CA. Tony has my grandfather’s stolen Disneyland images. Have you had any contact w/him? Need info for court case.” The reason the other parties to the deal gave for backing out of the deal was that they did not want to get involved with someone who was accused of a crime, i.e., possession of stolen property.

b. *Arguments in Opposition to Motion*

In his memorandum of points and authorities in opposition to the motion to strike, Christopher argued that his causes of action did not fall within the scope of section 425.16 because “[t]he principal thrust or gravamen of [Christopher’s] causes of action is that [Thie] engaged in malicious, calculated and deliberate attempts to damage the reputation and business relationships of [Christopher],” and the alleged actions did not occur in a public place or involve an issue of public interest. He also argued that, in any event, there is a probability he will prevail on his claims because he produced sufficient evidence to establish each of his causes of action, as well as evidence to establish that Thie was motivated by malice, and therefore the common-interest privilege did not apply.

3. *Thie's Reply*

In her reply to Christopher's opposition, Thie submitted a declaration from Mark Love—the person to whom Christopher wrote the check that he stated he believed was used to purchase the photographs and negatives. In his declaration, Love stated that he had never spoken to Thie or her attorney before January 17, 2018 (the declaration was signed on January 19, 2018, and filed on February 2, 2018). He declared that in 1992 he sold Christopher (and his business partner) a collection that included two pieces of art related to early Disneyland, a Disneyland opening day "Press Preview" ticket, and possibly some additional early Disneyland tickets, and received \$3,000 from Christopher for his portion of that collection; this was his one and only transaction with Christopher. He never possessed or sold to anyone negatives and photographs of Disneyland during its construction or of early Disneyland, and never owned copyrights, or told anyone he owned copyrights to photographs and negatives of Disneyland. He had never heard of Mell Kilpatrick until January 18, 2018, and never told anyone that he was a relative of Kilpatrick. Finally, he stated that he never placed an advertisement to sell Disney collectibles or memorabilia in the Los Angeles Times or any other publication.

Based upon Love's declaration, Thie argued that Christopher's assertion that he purchased the photographs and negatives in 1992 from a man who indicated he was a relative of Kilpatrick, and his evidence of the check he wrote for the purchase were fabrications.

Pointing to Christopher's changing positions on certain matters (such as the price at which he was willing to sell and what the person who sold the collection to him represented about his relationship to Kilpatrick), Thie argued that "[f]ailure to believe a liar or someone who constantly changes his position is not bad faith or the malice required to defeat the [common-interest privilege]."

4. *The Trial Court's Ruling*

In ruling on Thie's motion to strike, the trial court first observed that all of Christopher's causes of action arise from Thie's statements that the photographs and negatives were stolen. The court noted that inasmuch as Christopher's claims "are predicated on the premise that the photographs and . . . negatives in question have value because members of the public are interested in viewing and purchasing copies of these photographs," the causes of action necessarily arise from Thie's exercise of her right to free speech concerning a matter of public interest. Therefore, the court found that the causes of action arise from activity protected under section 425.16.

The court next addressed whether Christopher showed a probability of prevailing on his causes of action. The court began by noting that Thie demonstrated that the statements at issue in the lawsuit "were made on privileged occasions" because she and Van Eaton shared a common interest in avoiding the sale of stolen merchandise, and therefore the issue was whether Christopher could establish that Thie made the statements with malice. The court found that Christopher submitted sufficient evidence to raise triable issues of fact

as to whether Christopher purchased the photographs and negatives in 1992 (two years before the alleged theft) and whether Thie's belief that the photographs and negatives he possessed were stolen was reasonable. The court observed that, while Thie's evidence—including Love's declaration—contradicted Christopher's account, that evidence did not negate Christopher's evidence and instead merely demonstrated that the facts were in dispute. Thus, the court concluded there was a triable issue of fact regarding whether Thie acted out of malice, which would defeat her assertion of the common-interest privilege.

The court noted that although Christopher did not submit evidence to demonstrate he has a probability of prevailing on his causes of action with respect to his allegations regarding Thie's actions in initiating the small claims court action, the court declined to address those allegations because Thie "brings the subject motion against the entire Complaint and not against specific sub-parts of [Christopher's] claims." For the same reason, the court also declined to address Thie's assertion that the advertisement she placed in the Los Angeles Times was protected by the litigation privilege.

Finally, the trial court found that Christopher submitted sufficient evidence to satisfy the elements of his interference claims, but he failed to provide any evidence that he suffered emotional distress damages, and thus failed to establish a probability of prevailing on his emotional distress claims. Therefore, the court denied Thie's special motion to strike as to the first four causes of action (interference with prospective economic advantage, negligent interference with prospective economic advantage, intentional interference with

contractual relations, and inducing breach of contract), and granted it as to the intentional and negligent infliction of emotional distress causes of action. Thie timely filed a notice of appeal from the trial court's order.

DISCUSSION

A. Section 425.16 and the Standard of Review

Section 425.16 provides in relevant part: “A cause of action against a person arising from any act of that person in furtherance of the person’s right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.” (§ 425.16, subd. (b)(1).) An “act in furtherance of a person’s right of petition or free speech . . . in connection with a public issue’ includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law, (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, or (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.” (§ 425.16, subd. (e).)

A trial court presented with a special motion to strike engages in a two-step process. “First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one ‘arising from’ protected activity. (§ 425.16, subd. (b)(1).) If the court finds such a showing has been made, it then must consider whether the plaintiff has demonstrated a probability of prevailing on the claim.” (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 76.) To satisfy this burden, the plaintiff must demonstrate that each of the claims alleged is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment. (*Zamos v. Stroud* (2004) 32 Cal.4th 958, 965.)

The motion to strike may be directed at entire causes of action as pleaded in the complaint, or at specific allegations within a cause of action. As the Supreme Court explained in *Baral*, “[t]he anti-SLAPP procedures are designed to shield a defendant’s constitutionally protected *conduct* from the undue burden of frivolous litigation. It follows, then, that courts may rule on plaintiffs’ specific claims of protected activity, rather than reward artful pleading by ignoring such claims if they are mixed with assertions of unprotected activity.” (*Baral, supra*, 1 Cal.5th at p. 393.)

We review the trial court’s determination on a special motion to strike de novo. Like the trial court, “[w]e consider “the pleadings, and supporting and opposing affidavits . . . upon which the liability or defense is based.” [Citation.] However, we neither “weigh credibility [nor] compare the weight of the evidence. Rather, [we] accept as true the evidence favorable to the plaintiff [citation] and evaluate the

defendant's evidence only to determine if it has defeated that submitted by the plaintiff as a matter of law.” [Citation.]’ [Citation.]” (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 326.)

B. *First Step: Speech on a Matter of Public Interest*

Thie contends—and the trial court found—that Thie satisfied her burden on the first step of her special motion to strike because all of Christopher's claims are based upon Thie's assertions regarding the ownership of Disneyland memorabilia, which is an issue of public interest. Christopher's respondent's brief (such as it is⁸) does not address this step of the analysis at all. Moreover, by stating that he “adopts and incorporates” the trial court's ruling into his brief, Christopher appears to concede that Thie satisfied her burden to show that section 425.16 applies to his causes of action. Therefore, we will not address this issue and will proceed directly to the second step of the analysis.

C. *Second Step: Probability of Prevailing*

Thie contends that Christopher failed to demonstrate a probability of prevailing because (1) the conduct he alleges regarding her filing of the small claims court action and publication of the advertisement

⁸ Christopher's respondent's brief consists of four pages of general argument. It includes no summary of the evidence presented, no headings, no citations to any case law or statute, and no citations to any part of the record other than to the trial court's ruling, which Christopher states he “adopts and incorporates into his Brief.” It provides no assistance to this court.

seeking information for that action is subject to the absolute litigation privilege (Civ. Code, § 47, subd. (b)); and (2) the remaining conduct is subject to the qualified common interest privilege (Civ. Code, § 47, subd. (c)), and Christopher failed to show that she acted with malice. We address the application of each privilege in turn.

1. *Litigation Privilege*

The litigation privilege is codified in Civil Code section 47, subdivision (b), which provides, in relevant part, that a privileged communication is one made “[i]n any . . . judicial proceeding.” For well over a century, courts have interpreted the privilege to provide absolute immunity from tort liability to “communications with ‘some relation’ to judicial proceedings.” (*Rubin v. Green* (1993) 4 Cal.4th 1187, 1193.) “The usual formulation is that the privilege applies to any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action.” (*Silberg v. Anderson* (1990) 50 Cal.3d 205, 212.) The privilege “is not limited to statements made during a trial or other proceedings, but may extend to steps taken prior thereto” (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1057), so long as those statements have some relation to litigation that is actually contemplated in good faith and under serious consideration by a possible party to the proceeding (*Rubin v. Green, supra*, 4 Cal.4th at pp. 1194-1195).

There is no question that the filing of a small claims court action is protected by the litigation privilege, and cannot be the basis for

liability for any tort other than malicious prosecution. (*Silberg v. Anderson, supra*, 4 Cal.4th at p. 216 [“[t]he only exception to [the] application of [Civil Code] section 47[, subdivision (b)] to tort suits has been for malicious prosecution actions”].) Indeed, the trial court in this case appeared to agree that Christopher’s allegation regarding Thie’s initiation of the small claims court action was subject to the absolute litigation privilege. The court declined to strike that allegation, however, because it concluded that Thie had brought her special motion to strike only against the entire complaint and not against specific sub-parts of Christopher’s claims.

Our review of Thie’s motion leads us to conclude that the trial court was mistaken. Although her memorandum of points and authorities (and her appellant’s opening brief) failed to directly state that the allegation regarding the filing of the small claims court action should be stricken, she argued that the allegation sought redress for conduct that is absolutely privileged, and she clearly stated in her notice of motion that the motion sought to strike that allegation. Therefore, we direct the trial court on remand to strike the paragraph 37 of the complaint.

With regard to Christopher’s allegation about the advertisement Thie placed in the Los Angeles Times, the trial court expressly declined to address whether Thie’s statement in the advertisement that “Tony has my grandfather’s stolen Disneyland images” was absolutely privileged under the litigation privilege, concluding once again that it need not rule on sub-parts of Christopher’s claims. As with the allegation regarding the small claims court action, the trial court was

mistaken that Thie did not move to strike the specific allegation regarding the advertisement. Because she did so move, we must determine whether the advertisement is protected by the litigation privilege.

As noted, to be protected by the litigation privilege, a statement made outside of judicial proceedings must “have some connection or logical relation” (*Silberg v. Anderson, supra*, 50 Cal.3d at p. 212) to contemplated litigation (*Rubin v. Green, supra*, 4 Cal.4th at pp. 1194-1195). The trial court here questioned (but did not answer) whether the statement at issue—“Tony has my grandfather’s stolen Disneyland images”—did so. When viewed in context of the entire advertisement, it is apparent that it did.

The advertisement stated that Thie wanted information about Christopher for a court case; the highlighted statement indicated the subject of the court case. To be sure, the advertisement was poorly worded. But the clear implication is that Thie was asking for information regarding Christopher that might be relevant in a court case in which Christopher is accused of having stolen images. Therefore, it is absolutely protected by the litigation privilege and cannot form the basis for tort liability. Accordingly, we direct the trial court on remand to strike paragraph 34 of the complaint.

2. *Common Interest Privilege*

Thie contends the remaining alleged conduct for which Christopher seeks to recover was protected by the common interest privilege. The common interest privilege is a qualified privilege,

codified in subdivision (c) of Civil Code section 47. That subdivision provides, in relevant part, that the privilege applies to any “communication, without malice, to a person interested therein . . . by one who is also interested.” (Civ. Code, § 47, subd. (c).) “Th[e] privilege is ‘recognized where the communicator and the recipient have a common interest and the communication is of a kind reasonably calculated to protect or further that interest.’ [Citation.] The ‘interest’ must be something other than mere general or idle curiosity, such as where the parties to the communication share a contractual, business or similar relationship or the defendant is protecting his own pecuniary interest.” (*Hawran v. Hixson* (2012) 209 Cal.App.4th 256, 287.)

Under this provision, the “defendant generally bears the initial burden of establishing that the statement in question was made on a privileged occasion, and thereafter the burden shifts to plaintiff to establish that the statement was made with malice.” (*Taus v. Loftus* (2007) 40 Cal.4th 683, 721.) As the Supreme Court has explained, “[t]he malice necessary to defeat a qualified privilege is ‘actual malice’ which is established by a showing that the publication was motivated by hatred or ill will towards the plaintiff *or* by a showing that the defendant lacked reasonable grounds for belief in the truth of the publication and therefore acted in reckless disregard of the plaintiff’s rights [citations].”” (*Ibid.*) Thus, on a special motion to strike, if the moving party presents evidence demonstrating that the statements alleged in the complaint were made on a privileged occasion—i.e., by an interested party to another interested party—the burden shifts to the

party opposing the motion to establish a prima facie case that the statements were made with “actual malice.” (*Ibid.*)

In this case, the statements alleged in Christopher’s complaint were made by Thie to third parties asserting that the negatives and photographs Christopher had in his possession, which those third parties were attempting to sell or market on his behalf, were stolen and that she was the rightful owner of them. As the trial court correctly found, there is no question that these statements were made on privileged occasions because Thie and those third parties had a common interest in the rightful ownership of the items the third parties were marketing, and Thie was protecting her own pecuniary interest. (*Hawran v. Hixson, supra*, 209 Cal.App.4th at p. 287.) Thus, the only issue is whether Christopher satisfied his burden to establish a prima facie case that Thie acted with malice.

Thie contends that Christopher did not meet his burden because he did not prove that she bore hatred or ill toward him or that she lacked reasonable grounds for belief in the truth of her statements and thus acted in reckless disregard of Christopher’s rights. She asserts that the trial court based its conclusion that Christopher demonstrated a triable issue of fact as to malice solely on Christopher’s declaration that he purchased the photographs and negatives in 1992, two years before Thie claims her boxes containing her grandfather’s photographs and negatives were stolen. She argues that this was improper because the relevant inquiry is what her state of mind was rather than the truth or falsity of Christopher’s statement regarding the date of purchase. While we agree that the truth or falsity of Christopher’s statement is

not dispositive on the issue of malice (see *McGrory v. Applied Signal Technology, Inc.* (2013) 212 Cal.App.4th 1510, 1540 [“For purposes of establishing a triable issue of malice, ‘the issue is not the truth or falsity of the statements but whether they were made recklessly without reasonable belief in their truth’”]), upon our de novo review of the evidence presented, we disagree with Thie’s contention that there was insufficient evidence to establish a prima facie case that Thie acted with malice.

As noted, when reviewing the special motion to strike, we consider both the supporting and opposing declarations and evidence, accepting as true the evidence in favor of Christopher, as well as all favorable inferences that may be drawn from that evidence. (*Flatley v. Mauro, supra*, 39 Cal.4th at p. 326.) Applying that standard, we conclude there is sufficient evidence from which a trier of fact could conclude that Thie had no reasonable grounds for believing that the photographs and negatives in Christopher’s possession were stolen and that she acted in reckless disregard of his rights.

First, there was evidence that Christopher told Thie sometime between 2003 and 2006 that he had lawfully acquired the collection in 1992 from a relative of Kilpatrick. Although Christopher showed her some of the negatives, Thie did not examine the entire collection. Thus, Thie could not have known exactly what photographs and negatives were in the collection. Moreover, there is no evidence that Thie had ever catalogued the photographs and negatives she stated she had acquired from her grandfather’s darkroom; without such a catalog, she

would have no basis to determine whether the photographs and images in Christopher's collection had once been a part of her acquisition.

Second, according to Thie's own declaration, she did not start acquiring her grandfather's photographs, negatives, and other items until 1988, more than 30 years after the photographs at issue were taken. Despite Christopher's assertion that he had acquired the collection from a man who claimed to be a relative of Kilpatrick, Thie presented no evidence to negate the possibility that some other relative of Kilpatrick acquired the photographs and negatives in the collection sometime before 1988. Indeed, Thie stated in her own declaration that Christopher told her that he purchased the collection from Thie's brother, yet Thie provided no evidence to establish that he could not have so acquired it—she did not deny that she had a brother, nor did she provide a declaration from her brother or someone with knowledge to refute Christopher's assertion. Although the declaration from Love contradicted Christopher's implied assertion that he had purchased the collection from Love, a trier of fact could conclude that Christopher was mistaken in his identification of Love, but was correct in his assertion that he purchased the collection from Thie's brother or some other relative who had access to Kilpatrick's negatives and photographs before Thie took the eight boxes from Kilpatrick's darkroom.

Third, although Thie stated in her declaration that several boxes of her grandfather's photographs, negatives, and other possessions were stolen from the garage of her home in 1994, she has never produced any other proof of the alleged theft (such as a police report) despite being asked for such proof multiple times over several years.

In short, a reasonable trier of fact could infer from this evidence (or lack of evidence of the alleged theft) that Thie had no reasonable ground to believe that Christopher possessed photographs and negatives that were stolen from her and that her statements were made with reckless disregard for Christopher's rights. In other words, a trier of fact reasonably could conclude that Thie acted with malice, thus defeating the common interest privilege. Therefore, we affirm the court's order.

DISPOSITION

The order on Thie's special motion to strike is reversed to the extent the trial court denied Thie's request to strike paragraphs 34 and 37 of the complaint. The trial court is directed on remand to strike those two paragraphs. In all other respects, the order is affirmed. The parties shall bear their own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, J.

We concur:

MANELLA, P. J.

CURREY, J.